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No. 97-605

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BEN OEHRLEINS AND SONS AND DAUGHTER, INC., *et al.*
Petitioners,
v.
HENNEPIN COUNTY, MINNESOTA,
Respondent.

ROBINSON RUBBER PRODUCTS CO., INC., *et al.*,
Petitioners,
v.
HENNEPIN COUNTY, MINNESOTA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF AMERICANS FOR TAX REFORM FOUNDATION, SMALL BUSINESS SURVIVAL COMMITTEE AND CITIZENS FOR A SOUND ECONOMY FOUNDATION IN SUPPORT OF THE PETITION FOR CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Americans for Tax Reform Foundation, the Small Business Survival Committee, and Citizens for a Sound Economy Foundation move for leave to file the attached brief *amici curiae* in support of the petition in this case. Petitioners consented to the filing of this brief. Respondent has refused to give similar consent.

Each of the *amici* is a nonprofit organization engaged in research, citizen education, legislative advocacy, and regulatory monitoring in order to advance shared ideals of entrepreneurial incentive and economic freedom. Americans for Tax Reform Foundation is a nonprofit citizen advocacy group dedicated to reducing the size and

cost of government, protecting taxpayers and consumers from excessive regulation, and promoting economic freedom. The Small Business Survival Committee is a nonprofit organization representing the concerns of entrepreneurs with regard to the regulatory burdens and adverse effects imposed on small businesses by excessive governmental action. Citizens for a Sound Economy Foundation is a 250,000-member, nonpartisan, nonprofit consumer research and education group that promotes market-based solutions to public policy problems and opportunity for all people. None of the *amici* is affiliated with the waste industry, nor have any of the parties participated in the writing of this brief.

Amici, in filing this brief, wish to emphasize that the issue in this case is not limited to the problem of waste flow control, but also encompasses the ability of citizens to rely upon the unimpeded flow of all goods and services that is fundamental to our economic system. We believe that a fundamental safeguard of that system, the right of affected consumers to seek removal of state and local barriers to the free flow of commerce, is at stake. Further at issue is the principle that those harmed by unconstitutional state action should not be denied standing on "prudential grounds" because of the financial impact their recovery might have upon the government which enacted the unconstitutional provision.

Amici wish to bring this more expansive review to the attention of this Court in its consideration of the case. Accordingly, we respectfully move for leave to file the attached brief *amici curiae* in support of the petition.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether consumers of goods and services in interstate commerce fall within the "zone of interests" protected by the Commerce Clause, and if so, whether they have Article III standing to assert claims under the Commerce Clause when harmed by local discrimination.

2. Whether persons found by a court to have Article III standing and to have suffered a constitutional violation by a local government may nonetheless be denied standing and recovery based on the court's "prudential" desire to insulate the local government from the financial repercussions of its constitutional violation.

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INTERESTS OF *AMICI CURIAE*

The interests of the *amici* are set forth in the motion for leave to file a brief *amici curiae*.*

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* Pursuant to Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

This case arises out of an attempt by Hennepin County, Minnesota ("the county" or "Respondent") to regulate the generation, transport, and disposal of waste with a so-called "flow control" measure passed in 1989 and designated Hennepin County Ordinance No. 12 (hereinafter "Ordinance No. 12" or "the ordinance"). *See,* Petitioners' Brief at App. 78a. Ordinance No. 12 governed "the transportation and disposal of all Designated Waste generated or disposed of within the county." *Id.* at App. 90a. When implemented, the ordinance required that licensed waste haulers dispose of waste generated within Hennepin County exclusively at a designated facility in which the county had a significant financial interest. This requirement prohibited waste generators and waste haulers from participating in the interstate market for waste processing. It also imposed significantly higher disposal costs on the generators.

Hennepin County was fully aware that its actions would directly impact generators by restricting their access to out-of-state markets. *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County,* 115 F.2d 1372, 1381 n.7 (8th Cir. 1997). It used its law-making and regulatory powers to eliminate its interstate competition in the waste disposal market. Since the county's actions left waste generators without a competitive market for disposal services, the respondent was able to generate higher disposal fees for its own disposal sites.

In 1993, the United States Court of Appeals for the Eighth Circuit invalidated a flow control program very similar to Ordinance No. 12 in *Waste Systems Corp. v. County of Martin,* 985 F.2d 1381 (8th Cir. 1993). A number of other cases were decided in the years immediately following the passage of Ordinance No. 12 that pointed directly to its unconstitutionality, including a decision by this Court. *See, C & A Carbone, Inc. v. Town*

of Clarkstown, 511 U.S. 383 (1994). Despite these decisions, Hennepin County took no immediate action to remedy an increasingly obvious Commerce Clause violation. The county continued to maintain that Ordinance No. 12 was constitutional. Respondent ultimately took the unusual step of announcing that enforcement of the flow control ordinance would be "suspended until further notice" with respect to interstate transportation of Minnesota waste because it could no longer enforce Ordinance No. 12 in good faith. However, the ordinance itself remains in place. The county has failed to make any changes to Ordinance No. 12 that would bring it into constitutional compliance and has never admitted to the ordinance's unconstitutionality.

The district court found that the county's move to suspend rather than repeal or modify Ordinance No. 12 was calculated to cause uncertainty in the waste disposal market. Furthermore, the trial court found that the uncertainty caused by the suspension of Ordinance No. 12 was designed with a discriminatory purpose. It was intended to preserve the unconstitutional barrier to interstate commerce established by Ordinance No. 12.

The plaintiffs in *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County*, consisting of several in-state waste haulers, and one in-state and one out-of-state landfill, filed suit in 1994 in the federal district court for the District of Minnesota. The plaintiffs in *Robinson Rubber Products Company, Inc. v. Hennepin County*, composed of a certified class of Hennepin County residential and commercial waste generators, filed suit in 1995. The *Oehrleins* plaintiffs and the *Robinson Rubber* plaintiffs maintained that Ordinance No. 12 was an unconstitutional violation of the Commerce Clause, and sought both injunctive relief against enforcement of the ordinance and damages.

At trial, the county offered little to dispute the unconstitutionality of Ordiance No. 12 itself, but argued that

the plaintiffs had no standing to challenge it. *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County,* No. 4-94-63 (D.C. Minn. *filed* March 28, 1996). The district court disagreed and held that the plaintiffs in both *Oehrleins* and *Robinson Rubber* had standing having met the tripartitie requirements of particularity, traceability, and redressability set forth by this Court in *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992). *See, Ben Oehrleins and Sons and Daughter, Inc.,* No. 4-94-63 at 7 (Pet. Brief at App. 34a-35a); *Robinson Rubber Products,* No. 4-95-220 at 5 (Pet. Brief at App. 49a-50a). The district court also determined that the waste generator plaintiffs in *Robinson Rubber* were within the zone of interests protected by the Commerce Clause. *Rubber Products,* No. 4-95-220 at 8 (Pet. App. at 52a-56a).

With respect to substantive questions pertaining to the constitutionality of Ordinance No. 12, the district court found that the measure discriminated against interstate commerce both as enacted and as enforced, even after the Respondent "suspended" its application. Based on this determination of unconstitutionality, the district court issued a partial summary judgment and permanently enjoined Hennepin County from enforcing the ordinance.

The holding of the district court that the *Oehrleins* plaintiffs had standing was affirmed by the United States Court of Appeals for the Eighth Circuit in a consolidated appeal. The holding that Ordinance No. 12, as written and enforced prior to the county's suspension, facially discriminated against interstate commerce was also upheld. The Court of Appeals, however, reversed the district court in holding that although the *Robinson Rubber* plaintiffs met Article III standing requirements, they were not within the zone of interests protected by the Commerce Clause. As such, the Eighth Circuit held that the *Robinson Rubber* plaintiffs lacked standing to collect damages. The Court of Appeals also reversed the district

court in holding that once the county suspended enforcement, the ordinance as enforced ceased to be discriminatory to out-of-state interests. The appellate court then remanded that part of the *Oehrleins* case necessary for determination.

ARGUMENTS

This case raises important constitutional questions about the standing of individuals under the dormant Commerce Clause and the extent to which a court may deny them standing to seek relief based on prudential concerns. With specific regard to the issue of standing, the opinion of the Court of Appeals undermines the precedent set forth by this Court in a line of cases dating from 1949. This Court has made clear that the Commerce Clause of the United States Constitution, and restrictions imposed on the States by the dormant Commerce Clause, are intended to shield consumers from the parochial interests of local and state governments when they intervene in interstate commerce. In essence, consumer protection from local discrimination is an inherent and fundamental purpose of the Commerce Clause.

Mere acknowledgment of such a purpose is scant protection for aggrieved consumers unless their rights to engage in interstate commerce can be safeguarded and vindicated. Allowing standing for harmed individuals to seek relief is necessary to ensure that the protections afforded by the Commerce Clause are not eviscerated. If those directly harmed by local protectionism must rely on third parties to assert their rights, or are deemed incapable of asserting them at all, then the protection of the Commerce Clause is substantially diminished. The decision of the Court of Appeals represents such an erosion and is in direct conflict with this Court's holdings. As such, it merits careful scrutiny.

I. STANDING FOR INDIVIDUALS TO SEEK RELIEF FROM DISCRIMINATORY LOCAL LAWS IS A NECESSARY COMPONENT OF AN EFFECTIVE DORMANT COMMERCE CLAUSE

The United States Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power . . . To regulate Commerce with Foreign Nations and among the several States, and with the Indian Tribes." This Court has found from its earliest cases, that this grant of power contains an inherent "dormant" element which "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc. v. Dept. of Environ. Quality*, 511 U.S. 93 (1994). Indeed, the primary protection against discriminatory local barriers to commerce has been the dormant Commerce Clause jurisprudence first enunciated by this Court in *Gibbons v. Ogden*, 22 U.S. 1 (1824). This jurisprudence has developed mainly as a result of actions brought by those individuals harmed by the application of state and local laws that favor in-state transactions or discriminate against interstate commerce.

A. The Individual Right To Engage In Interstate Commerce Is Strongly Rooted In Precedent And Attaches To All Stages Of The Stream Of Commerce.

The Commerce Clause was intended to fulfill two of the Constitution's primary purposes: the creation of a national marketplace and prevention of economic balkanization. It is designed to prevent States from engaging in harmful and retaliatory trade wars with one another. Although local governments have indeed been vigorous in their attempts to impose barriers upon interstate commerce, they have not been as zealous in seeking removal of such barriers imposed upon their own citizens by other states or localities. Traditionally, it has been those individuals affected by the discriminatory practice of a state or local government who have been most active and effective in seeking removal of such impediments.

The most efficient manner of deterring the enactment of policies which discriminate against interstate commerce is to grant individuals the right to challenge such policies directly. A system in which citizens harmed by a discriminatory barrier are dependent upon their own local government or another third party to assert their rights under the Commerce Clause would not provide for consistent, efficient, or equitable application of Commerce Clause jurisprudence. For instance, it might be more expedient for a State to retaliate using its own laws than to seek to invalidate protectionist efforts of other jurisdictions. Other States might choose not to act at all to protect their citizens from discriminatory barriers erected in other jurisdictions. Because of such concerns, this Court has held that the right to engage in interstate commerce is an individual right guaranteed by the United States Constitution and actionable under 42 U.S.C. § 1983. *Dennis v. Higgins*, 498 U.S. 439 (1991).

Defining the right to engage in interstate commerce *as an individual right* is critical in order to realize the system which the Framers of the Constitution envisioned, one where: "[e]very farmer and every craftsman be encouraged to produce by the certainty that he will have free access to every market in the Nation . . . . Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949).

The Commerce Clause protects the rights of individuals all along the stream of interstate commerce by allowing them to seek removal of discriminatory barriers. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 202-203 (1994) ("[F]or over one-hundred and fifty years, our cases have rightly concluded that the imposition of a differential burden *on any part of the stream of commerce*—from wholesaler to retailer to consumer—is invalid." (emphasis added.)) This Court has readily found

standing under the Commerce Clause in a myriad of cases where an out-of-state seller seeks removal of some locally erected, tariff-like barrier that discriminates in favor of in-state interests. *See, e.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994); *Healy v. The Beer Institute*, 491 U.S. 324 (1989). But this Court has recognized that plaintiffs need not always fit into the category of "out-of-state seller" in order to have standing under the Commerce Clause to seek a constitutional remedy. *See, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S.Ct. 1590 (1997). Granting standing to such plaintiffs greatly facilitates the removal of unconstitutional barriers and has an equally important deterrent effect upon localities and state governments.

It ordinarily requires a tremendous twisting of both logic and the purpose of the Commerce Clause to conclude that one participant in an interstate transaction is entitled to standing while the other party to the same transaction lies outside the scope of constitutional protection. However, the Eighth Circuit Court of Appeals came to precisely this conclusion in denying standing for the *Robinson Rubber* plaintiffs while allowing standing for the *Oehrleins* plaintiffs. In holding thus, the Eighth Circuit has created uncertainty about this Court's established standing jurisprudence. The Court of Appeals' decision, if allowed to stand, could encourage further intrusion into the marketplace by those intent on discriminating against interstate commerce, as the deterrent effect upon localities becomes considerably weakened and the purpose of the Commerce Clause is seriously undermined.

B. The Court of Appeals Erred In Concluding That The Generators Suffered No Violation Of Their Rights And Are Outside The Zone Of Interests Protected By The Commerce Clause.

The Court of Appeals misapplied the zone of interests test that this Court has set forth in reasoning that the

Robinson Rubber plaintiffs must be directly subject to the discrimination in order to have standing. *Ben Oehrleins and Sons and Daughter, Inc.*, 115 F.3d at 1385. The Court has squarely rejected this "directly regulated" requirement on several occasions, recognizing that onerous barriers to interstate commerce may do serious harm to individuals either directly or indirectly. Just last term in *Camps Newfound/Owatonna, Inc. v. Town of Harrison,* a municipality sought to deny standing to an in-state plaintiff based on the indirect nature of a discriminatory assesment it had imposed on summer camps. The Court dismissed directness as a reason to deny standing in that case in finding that: "The discriminatory burden is imposed on the out-of-state customer *indirectly* by means of a tax imposed *on the entity transacting business* with the non-Maine cutomer." 117 S.Ct. at 1600 (emphasis added).

In several other cases, most notably *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977) and *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984), this Court has founded that neither the indirect nature of a barrier, nor the in-state character of those bringing a challenge, excluded plaintiffs from the zone of interests protected by the Commerce Clause. In *General Motors Corp. v. Tracy,* 117 S. Ct. 811 (1997), this Court explained that: "cognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom a state ultimately discriminates. . . . Consumers who suffer this sort of injury from regulation forbidden under the Commerce Clause satisfy the standing requirements of Article III." *General Motors Corp.*, 117 S. Ct. at 818.

Besides addressing the concept of directness, the above cases provide even more confirmation that the individually actionable right to engage in interstate commerce articulated in *Dennis* extends to those at all stages of the stream of commerce, including in-state consumers. To

hold otherwise, as the Court of Appeals did, creates an enormous loophole for localities whose actions impede the free flow of interstate commerce. More importantly, it would render the individual right guaranteed by *Dennis* inaccessible to some of the most severely harmed parties. The direct/indirect test envisioned by the Court of Appeals when applied in this case creates an unnecessary distinction between those generators who haul their own waste and those who contract with third parties to do so, even though they suffer similar harm. There is nothing in the precedent of this Court to justify a return to an Articles of Confederation era definition of interstate commerce as including only those who physically cross state lines.

In addition to erroneously narrowing the zone of interests that this Court has held to be protected by the Commerce Clause, the Court of Appeals in the same stroke narrowed the definition of constitutional injury. Following the logic of the Court of Appeals, merely paying increased costs directly traceable to a discriminatory barrier is insufficient to invoke standing under the Commerce Clause, even when the cost of the harm equals tens of millions of dollars. Such a holding here is even more surprising considering that the potential for a significant financial impact on the Respondent contributed to the Eighth Circuit's denial of standing for the *Robinson Rubber* plaintiffs on prudential grounds. *See, Ben Oehrleins and Sons and Daughter, Inc.*, 115 F.3d at 1387 n.9.

II. DENIAL OF STANDING ON PRUDENTIAL GROUNDS BECAUSE OF THE FINANCIAL CONSEQUENCES FOR THE UNCONSTITUTIONAL GOVERNMENT ACTOR SETS A DANGEROUS PRECEDENT

In addition to Article III standing grounds and prudential considerations about the zone of interests test, the Court of Appeals based its denial of standing in part on

alternative prudential considerations. The lower court alluded to its concerns about the costs associated with a finding adverse to Hennepin County as one justification for denying standing to the in-state waste generator plaintiffs.

> We are mindful that granting standing to consumers bearing passed-on costs in Commerce Clause cases could have serious repercussions on state and local governments' ability to enact economic regulations. This is because they would risk enormous liability if such regulation is later invalidated. Here, for example, the waste generator plaintiffs' damage claims exceed $100 million. Especially in the current context, where limits of local authority to regulate waste streams are unclear, such risks presents (sic) a heavy burden to good faith efforts to enact valid laws intended to further important local goals.

Ben Oehrleins and Sons and Daughter, Inc., 115 F.3d at 1387 n.9.

Not only does the Court of Appeals appear to be attempting to fashion from the doctrine of prudential standing a "good faith exception" to unconstitutional activities on the part of State and local governments, it does so in direct conflict with this Court's precedent.

As discussed in Section I, *supra*, the ability of individuals to seek vindication under the Commerce Clause is a fundamental component of the framework developed by the Founding Fathers to ensure that the States, while preserving their sovereignty, do not do so at the expense of other States, American consumers, or national unity.

Given the importance that the Founders placed on the free flow of commerce, and the natural inclination of many States to protect domestic industries at the expense of other States, the Court of Appeals' attempt to create a "good faith" justification for invoking the prudential standing doctrine is wholly inappropriate. The grounds cited by the lower court for invoking such an exception—

the potential cost of remedying unconstitutional state action—set a dangerous precedent. If the cost of remedying unconstitutional activity is a factor in determining whether a plaintiff has standing, there is the potential for a perverse outcome: unconstitutional state action that has a *de minimus* economic effect may be remedied, but similar action that requires substantial resources to compensate those who have suffered more serious injuries may not.

Lower courts should not be permitted to invoke the prudential standing doctrine to determine when justice is affordable for the public and when it is not. To do so would inject a measure of capriciousness in our judicial system much like the now discredited concept of "substantive due process." *See, e.g., Lochmar v. New York,* 198 U.S. 45 (1905), *overruled, in part, by Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421 (1952) and *overruled, in part, by Ferguson v. Skrupa,* 372 U.S. 726 (1963).

Aside from being inappropriate, the lower court's justification for denying standing on prudential grounds ignores precedent. This Court has consistently held that the economic costs of remedying an unconstitutional act have no bearing on the ability of plaintiffs to seek relief. *C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383, 393-94 (1994) (The generation of revenues is not a local interest that may justify the erection of barriers to the free flow of interstate commerce.); *Maryland v. Craig,* 497 U.S. 836, 870 (1990) (Scalia, J., dissenting) ("We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings."); *McKesson v. Division of Alcoholic Beverages and Tobacco,* 486 U.S. 18, 51 (1990) (A "clear and certain remedy" is a fundamental requirement for due process.); *Bounds v. Smith,* 430 U.S. 817, 825 (1977) ("[T]he cost of protecting a constitutional right cannot justify its total denial."). *See also, Atlantic Coast Demolition and Recycling v. Board*

of Chosen Freeholders, 112 F.3d 652, 666-67, 671-72 (3d Cir. 1997), *petition for cert. filed as* Nos. 97-400 and 97-430.

The potential cost of remedying the injuries caused by the effect of Hennepin County's flow control ordinance on interstate commerce, or any other constitutional injury, should have no bearing on whether a court invokes the doctrine of prudential standing. Any other outcome would endanger the judicial system by undermining the public's confidence in our courts and judges and would erode political accountability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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